

BEFORE
The Illinois Department of Labor
160 N. LaSalle Street – C-1300
Chicago, Illinois 60611

| | | |
|--|---|-----------------------|
| In the matter of: |) | |
| |) | |
| Stanely Simrayh, as a member of |) | |
| The International Union of Operating |) | |
| Engineers, Local #750, AFL-CIO and the |) | 15-H-JN07-0853 |
| International Union of Operating Engineers, |) | |
| AFL-CIO, |) | |
| |) | |
| Petitioner, |) | |
| and |) | |
| |) | |
| Joseph Costigan, Director of Labor |) | |
| and the Illinois Department of Labor, |) | |
| |) | |
| Department. |) | |

ORDER

The Department received written objections filed by the Petitioner to establish a classification of survey worker and a prevailing rate of wages for said classification. The Department issued a Notice of Hearing on August 8, 2014, scheduling a hearing for September 8, 2014, before Administrative Law Judge Michael Haggerty. The Department subsequently issued an order dated August 13, 2014 allowing for intervention and providing for a prehearing conference on September 8, 2014, at 10:30 a.m.

Subsequently, by letter dated August 20, 2014, the Associated General Contractors of Illinois, American Council of Engineering Companies of Illinois, Illinois Society of Professional Engineers, Southern Illinois Builders Association, Illinois Professional Land Surveyors Association, Illinois Road & Transportation Builders Association, Hispanic American Construction Industry Association, and others through their attorneys, Hesse Martone and Bruce S. Bonczyk, filed Written Objections to the Prevailing Wage Determination of Survey Worker and Survey Foremen Classifications ("Martone Objection"), Exhibit 1, attached hereto.

The Martone Objection relates to and encompasses the same issues that are present in the Petitioner's Objections. Therefore, the undersigned hereby orders the consolidation of the Martone Objection with the Petitioner's Objection scheduled for hearing before Judge Haggerty. The Order scheduling the prehearing conference for September 8, 2014, is amended to include issues relating to the Martone Objection.

By Joseph Costigan
Joseph Costigan
Director

Dated: August 21, 2014.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has caused a copy of the foregoing Order to be served upon the below listed at the addresses indicated via U.S. Mail and being placed on the Illinois Department of Labor official website at <http://www.Illinois.gov/idol/Laws-Rules/legal/Pages/Hearings.aspx>:

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August 22, 2014



HESSE | MARTONE

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August 20, 2014

Mr. Joseph Costigan
Director of the Department of Labor
Illinois Department of Labor
160 North La Salle
C-1300
Chicago, IL 60601

Re: *Written Notice of Objections to Prevailing Wage Determinations of Survey Worker and Survey Foremen Classifications*

Dear Mr. Costigan:

We represent the Associated General Contractors of Illinois, American Council of Engineering Companies of Illinois, Illinois Society of Professional Engineers, Southern Illinois Builders Association, Illinois Professional Land Surveyors Association, Illinois Road & Transportation Builders Association, Hispanic American Construction Industry Association, Diamond Construction Company, United Contractors of Midwest, Inc., Advanced Asphalt Company, E.T. Simonds, Tarlton Corporation, ARC Design Resources, Inc., Shive-Hattery, Inc., Pi Surveying Group, P.C., Robinson Engineering, Ltd., Prairie Engineers of Illinois, P.C., Hermann & Associates, L.L.C., Klingner & Associates, P.C., McDonough-Whitlow, P.C., Andrews Engineering, Inc., Tyson Engineering, Inc., Bowman, Barrett & Associates, Inc., Maurer-Stutz, Inc., Oates Associates, Inc., Crawford, Murphy & Tilly, Inc., Ament, Inc., Alfred Benesch & Company, Chastain & Associates, L.L.C., Clark Dietz, Inc., Coombe-Bloxdorf, P.C., Farnsworth Group, Inc., Kaskaskia Engineering Group, L.L.C., SCI Engineering, Inc., Woolpert, Inc., Hartke Engineering and Surveying, Inc., and Poepping, Stone, Bach & Associates, Inc. The Petitioners represent employers or direct the employees who would fall within the broad classifications of survey worker and survey foreman.

Pursuant to the Court's Order on July 10, 2014, recognizing the parties' settlement agreement filed July 8, 2014, we are writing to provide written notice objecting to the Illinois Department of Labor's Prevailing Wage determinations for the classifications survey worker and survey foreman in all counties of Illinois. This notice is provided pursuant to both 820 ILCS § 130/9 and the aforementioned Court Order and Settlement Agreement.

I. Survey employees are excluded from the Prevailing Wage Act because they do not perform actual construction work on the site of construction.

The Illinois Prevailing Wage Act does not apply to survey employees because those employees do not perform duties within the scope of the IPWA. The IPWA limits its application to laborers, workers, and mechanics engaged "in actual construction work on the site of the building or construction job" and those "engaged in the transportation of materials and equipment to or from the site." 820 ILCS § 130/3. The Petitioner's employees who fall within the survey classifications spend a substantial amount of their time performing job duties off the site of construction rather than on the site of construction and when they are on site, they are not engaged in "actual construction work." Therefore, survey workers are not within the scope of the IPWA because they do not perform actual construction work on the site of the project.

The structure of Illinois' procurement system supports excluding survey employees from the IPWA. The Illinois Procurement Code, 30 ILCS 500/1-1 through 99-5 ("Procurement Code"), differentiates between "construction," "construction-related services," and "construction-related professional services" as follows:

"Construction" means building, altering, repairing, improving, or demolishing any public structure or building, or making improvements of any kind to public real property. Construction does not include the routine operation, routine repair, or routine maintenance of existing structures, buildings, or real property.

"Construction-related services" means those services including construction design, layout, inspection, support, feasibility or location study, research, development, planning, or other investigative study undertaken by a construction agency concerning construction or potential construction.

"Construction-related professional services." All construction-related professional services contracts shall be awarded in accordance with the provisions of the Architectural, Engineering, and Land Surveying Qualifications Based Selection Act. "Professional services" means those services within the scope of the practice of architecture, professional engineering, structural engineering, or registered land surveying, as defined by the laws of this State.

30 ILCS 500/1-15.20, 30-15. The Procurement Code also creates different procurement systems for construction contracts and for surveying contracts. 30 ILCS 500/30-15. Construction contracts are let through a competitive bidding process that requires selection of the lowest qualified bidder. 30 ILCS 500/30-15. A bidder must comply with the IPWA in order to qualify as a "responsible bidder." 30 ILCS 500/30-22(2). Conversely, surveying contracts are let through the Architectural, Engineering, and Land Surveying Qualifications Based Selection Act ("QBS Act").

The QBS Act covers architecture, engineering, and land surveying services provided for capital improvement projects. 30 ILCS 535/15. The QBS Act permits agencies to select a service provider and negotiate directly with the service provider on the fees for those services. 30 ILCS 535/35. The QBS Act does not require the survey provider to comply with the IPWA to be qualified.

Thus, the procurement process supports the notion that survey work is not covered “actual construction work” under the IPWA, but rather is excluded as “construction-related professional services.”

Furthermore, land surveying is different from other trades that work at a construction site. Land surveying in Illinois is a highly regulated field that the Illinois General Assembly has declared to affect the public health, safety, and welfare and to be a matter of public interest and concern. 225 ILCS 330/1. Professional land surveyors must apply for a license in Illinois and pass an examination testing their knowledge of both federal and Illinois law regarding surveying. A Licensed Land Surveyor-in-Training must have a baccalaureate in Land Surveying from an accredited college or university program or a baccalaureate in a related science including 24 semester hours in land surveying courses. 225 ILCS 330/13; 68 Ill. Admin. Code 1270.5. A Professional Land Surveyor must have a baccalaureate in related science or in land surveying, have been issued a license as a Survey-in-Training, and had four years’ experience as a Surveyor-in-Training under the supervision of a licensed professional land surveyor. 225 ILCS 330/12; 68 Ill. Admin. Code 1270.10. Continuing education can also be required to retain a license. 225 ILCS 330/18.5. Importantly, professional land surveyors can be disciplined for failing to adequately supervise or control land surveying operations being performed by subordinates. 225 ILCS 330/27(a)(18).

The United States Department of Labor’s (“DOL”) interpretation of the federal prevailing wage law, 40 U.S.C. §§ 3141-3148 (“Davis Bacon Act”), also supports the exclusion of survey employees from the IPWA. The DOL’s interpretation of the Davis Bacon Act includes only survey workers who “are employed by contractors and subcontractors performing primarily physical and/or manual duties in direct support of construction crews in work performed immediately prior to or during actual construction.” See attached DOL letter dated December 2, 2013. The DOL also recognizes important exceptions for (1) surveyors working in the design phase of construction; (2) survey crew members who are not employed by a construction contractor or subcontractor; and (3) individuals who meet the Fair Labor Standards Act exemptions (generally executive, administrative, and professional employees).

The Department’s Survey Worker and Survey Foreman classifications potentially cover a broad group of employees who do not perform “actual construction work on the site of the building or construction job” and are, therefore, contrary to the IPWA.

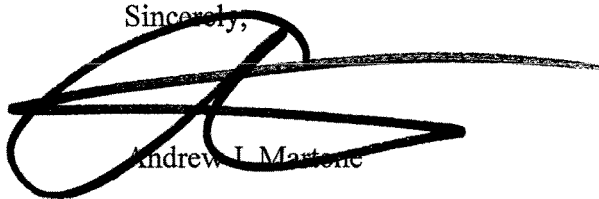
Mr. Joseph Costigan
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II. If survey employees are determined to be covered by the Illinois Prevailing Wage Act, the Department's determination of the prevailing wage rate does not reflect the amount paid generally in each locality to employees performing similar work on public works.

If it is determined that employees within the survey classifications are covered by the IPWA, the prevailing wage determination by the Illinois Department of Labor does not reflect "the hourly cash wages plus fringe benefits for training and apprenticeship programs approved by the U.S. Department of Labor, Bureau of Apprenticeship and Training, health and welfare, insurance, vacations and pensions paid generally, in the locality in which the work is being performed, to employees engaged in work with a similar character on public works." 820 ILCS 130/2. Petitioners request an investigatory hearing to establish the proper prevailing wage rates for the two classifications. Please also forward to us the information relied upon by the Department of Labor in making the wage classifications and determinations.

Thank you for your attention to this matter. Please contact us if you have any additional questions.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read "Andrew J. Martone".

-and-

A handwritten signature in black ink, appearing to read "Bruce S. Bonczyk / pmm".

Bruce S. Bonczyk
Bruce S. Bonczyk, Ltd. Law Office

AJM/BSS/mbr

cc: Ronald M. Willis, Esq., Chief Legal Counsel, Illinois Department of Labor (via email)